

in AT&T's original Petition and that the Commission's decision regarding the original prepaid calling card service applies to the first variant. The Commission should also find that the regulatory treatment of the second variant of AT&T's prepaid calling card service has already been addressed by the Commission's decision in its IP-In-The-Middle Order,⁵ making clear that the second variant is also a telecommunications service.

I. THE TWO VARIANTS OF AT&T'S PREPAID CALLING CARD SERVICE ARE TELECOMMUNICATIONS SERVICES.

The Commission should definitively affirm that the two variants of AT&T's prepaid calling card service are telecommunications services. The Commission's previous finding in the AT&T Order with regard to the prepaid calling card service at issue in the AT&T Petition is directly applicable to the first variant of AT&T's prepaid calling card service. The Commission's finding in its IP-In-The-Middle Order is also directly applicable to the second variant of AT&T's prepaid calling card service.

The First Variant

The first variant is described as providing a customer with the "option to listen to additional information or perform additional functions before listening to the advertising message."⁶ The Commission also notes that "[w]hen the chosen option is completed, or if no option is chosen, *the caller is directed to dial the destination number* and at that point the platform transmits the advertising message in the same manner as the original version of the service."⁷ What is clear, or should be clear, is that this first variant is no different than the

⁵ See *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, WC Docket No. 02-361 (rel. Apr. 21, 2004) (IP-In-The-Middle Order).

⁶ NPRM, ¶38.

⁷ AT&T Order, ¶11 (emphasis added).

prepaid calling card service that was the subject of the AT&T Petition and that was definitively declared to be a telecommunications service in the AT&T Order.

In the AT&T Order, the Commission stated that [a]djunct-to-basic services are services that are ‘incidental’ to an underlying telecommunications service and do not ‘alter[] their fundamental character’ even if they may meet the literal definition of an information service or enhanced service.”⁸ Importantly, the Commission cited to a number of proceedings where services incidental to telecommunications services were identified,⁹ one of which is particularly relevant in addressing AT&T’s first variant: *AT&T 900 Dial-It Services and Third Party Billing and Collection Services*.¹⁰ As the Commission described that holding, a “service is an enhanced service if the information provided is ‘not incidental’ to the basic telecommunications service, but rather is ‘the *essential service* provided.’”¹¹ In AT&T’s first variant of its prepaid calling card service, the essential service that is being provided is the ability to make a telephone call. It should be unnecessary to state the obvious, but consumers buy prepaid calling cards in order to make telephone calls. They do not buy them to hear an advertising message, to add minutes to their cards, or to donate minutes to U.S. armed forces serving in Iraq, even though those options may be provided prior to making a telephone call. Such options are merely incidental services that the consumer may choose to utilize, but certainly none of them is the essential service for which the prepaid calling card was purchased. Accordingly, for the same reasons that the Commission found AT&T’s prepaid calling card service, as initially described in its Petition, to

⁸ *Id.*, ¶16.

⁹ See AT&T Order, fn.28.

¹⁰ *AT&T 900 Dial-It Services and Third Party Billing and Collection Services*, Memorandum Opinion and Order, 4 FCC Rcd 3429, File No. ENF-88-05 (CCB 1989).

¹¹ See AT&T Order, fn. 28.

be a telecommunications service, so should the Commission find with regard to the first variant of AT&T's prepaid calling card service as described in the AT&T November 22 Letter.

The Commission should be cognizant that if it does not find that the first variant of AT&T's prepaid calling card service is a telecommunications service, the impact of that decision may be significant and far reaching. If the first variant of AT&T's prepaid calling card service were found to be an information service, contrary to existing precedent that says otherwise, then it may only be a short period of time before providers of all types of services – wireline, wireless, and other prepaid calling card services – implement systems that provide their customers with interactive options that have nothing, or very little, to do with making a telephone call prior to the customer initiating a call in order to have their services classified as information services.¹² In fact, if the Commission adopts the erroneous view that implementing a strategically placed set of interactive options before a customer can place a call makes the prepaid calling card service a purported “information service,” then it should be clear that it may be necessary for all types of service providers to implement systems of pre-call options that would then also classify their services as “information services” in order to create a level playing field and thereby enable these providers of different services to remain competitive. However, what is likely to be the rapid movement of all service providers to systems that would result in classifying their services as information services would have a number of harmful results – that there may then be no more

¹² Although the first variant of AT&T's prepaid calling card service does not appear to require its customer to make any selection of an option in order to ultimately place a call, that fact should not be dispositive. It is not difficult to imagine that in the future carriers easily could require their customers to select an option just to be able to place a call. For example, a carrier could implement a selection system that initiated as soon as the customer picked up his telephone receiver, which prompted him to press 1 to make a call, with additional prompts for other services – for example, press 2 to hear the weather forecast, press 3 to hear information about XYZ company, etc. Importantly, even if a customer were required to select an option (*i.e.*, press 1) to place a call, that interaction does not make the call any more of an information service than a call made under AT&T's original prepaid calling card service that was the subject of its Petition.

Title II regulation because information services are not regulated under Title II; no more state regulation because information services are interstate in nature and not subject to state jurisdiction; and no more contributions to universal service because the Commission does not currently require information service providers to contribute to universal service. Certainly the use of one definition in the Communications Act of 1934, as amended (Act), should not render a significant portion of the Act a nullity. There may be additional negative impacts, but certainly the three identified here are important enough to warrant careful scrutiny by the Commission when making a decision on the classification of the first variant of AT&T's prepaid calling card service.¹³

The Second Variant

The second variant is described as the transport of “enhanced calling card calls over [AT&T's] Internet backbone network using IP technology.”¹⁴ The Commission notes that “AT&T states that these calls are not dialed on a 1+ basis and therefore are not covered by the Commission's prior determination that “IP-in-the-middle” calls are telecommunications services, not information services.”¹⁵ Again, what is clear, or should be clear, is that this second variant is no different than the scenario addressed in the IP-In-The-Middle Order.

¹³ The Commission should also be mindful as it evaluates the classification that applies to the first variant of AT&T's prepaid calling card that there are already a number of bundled telecommunications and information services that are regulated on the whole as telecommunications services. For example, when a customer away from home dials an access number to reach his network voice mail, the voice mail retrieval is an information service, but it is accomplished via a telephone call and the whole activity of making the call to retrieve a voice mail message is a telecommunications service. Similarly, many wireless providers now provide their customers with a service that allows them to take a picture with their wireless phone and then send that picture to another wireless customer via a telephone call. The call that sends the picture is clearly a bundle of telecommunications and information services, which is regulated wholly as a telecommunications service.

¹⁴ NPRM, ¶38.

¹⁵ AT&T Order, ¶12.

In the IP-In-The-Middle Order, the Commission clarified that an “interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider’s use of IP technology” is a telecommunications service.¹⁶ Although the specific service at issue in the IP-In-The-Middle Order was a 1+ service, rather than an 8YY service, the three-step analysis applied to AT&T’s 1+ service would also apply to 8YY service and such analysis would define the 8YY service associated with AT&T’s prepaid calling card service as a telecommunications service. In addition, at its most basic level, a call made to an 8YY number is still a 1+ call; the purpose of dialing an 8YY number in place of a geographic NPA is to provide the originating carrier with billing instructions. In other words, when an end user dials an 8YY number, that number tells the originating carrier that the caller will not pay for the long distance call. Accordingly, the Commission need look no further than its IP-In-The-Middle Order for support to find that AT&T’s IP-in-the-middle argument is baseless.

II. THE BROADER CLASSIFICATION ISSUES OF PREPAID CALLING CARD SERVICES THAT DIFFER FROM AT&T’S TWO VARIANTS SHOULD BE CONSIDERED IN OTHER EXISTING FCC DOCKETS.

The Commission uses this NPRM to go beyond the two variants of prepaid calling card services identified in the AT&T November 22 Letter, asking how it should address prepaid calling card services that incorporate features and capabilities that are not addressed in the NPRM and services that rely on IP technology in different ways and whether any of these differences would be relevant in classifying such services as information services rather than telecommunications services.¹⁷ USTA does not comment now on whether different features or

¹⁶ IP-In-The-Middle Order, ¶1.

¹⁷ See NPRM, ¶41.

capabilities should drive a different classification of prepaid calling card services. Rather, USTA maintains that the only issue that should be addressed here is the regulatory classification of the two variants of prepaid calling card service proposed by AT&T. The broader classification issues of prepaid calling card services that may differ from AT&T's two variants based on features, capabilities, or transmission technology should be considered by the Commission in other existing dockets, particularly in the Commission's proceedings on intercarrier compensation and IP-enabled services, in order to ensure that any classifications are consistent with determinations made by the Commission on these broader issues.

CONCLUSION

For the foregoing reasons, the Commission should find that the two variants of AT&T's prepaid calling card service are telecommunications services and it should defer consideration of broader classification issues involving prepaid calling card services to other pending proceedings where the overall scope of such decisions can be weighed.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By: 

James W. Olson
Indra Sehdev Chalk
Robin E. Tuttle

Its Attorneys

1401 H Street, NW, Suite 600
Washington, D.C. 20005-2164
(202) 326-7300

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CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on April 15, 2005, the aforementioned Comments of The United States Telecom Association were electronically filed with the Commission through its Electronic Comment Filing System and electronically mailed to the following:

BCPI
Portals II
445 12th Street, SW
CY-B402
Washington, DC 20554
qualexint@aol.com

By: _____/s/_____